



February 6, 2019

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Penobscot Nation

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Passamaquoddy Tribe

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Secretary
Alaska Native Tribal Health
Consortium

Ann Wyatt
Klawock Cooperative
Association

Virginia Department of Environmental Quality
Air Division
PO Box 1105
Richmond, Virginia 23218

RE: Request for Tribal Consultation Mechanism on the ACE Proposed Rules

Division Director Michael Dowd:

On July 23, 2018, the National Tribal Air Association (NTAA) submitted a letter to your agency regarding state comments on the Environmental Protection Agency's (EPA) proposed Affordable Clean Energy (ACE) rules. In our letter, we asked that the State of Virginia strongly consider establishing a Tribal consultation mechanism for engaging with all the Tribes in the state on your agency's development of comments to the ACE. To further that outreach, we also committed to sharing our comments with your agency, so that you are aware of the NTAA's position on the proposed ACE rule. Attached please find the comment letter the NTAA submitted to EPA.

Because the rulemaking process is not yet completed, the NTAA continues to encourage your agency to consult with Tribes in your state before any state comments on a Final ACE Rule are submitted to EPA.

Tribal Consultation

While the Tribes in the Virginia have a unique government-to-government relationship with the federal government, the Tribes also have a government-to-government relationship with the state. Consultation is a core element of this government-to-government relationship.

Native American Tribal communities possess unique vulnerabilities to climate change. These communities are impacted by the degradation of natural and cultural resources on Tribal lands, both within and outside reservations. This includes Tribal usual and accustomed fishing areas and off-reservation treaty rights that often reach far beyond the reservation boundaries. These Tribal communities whose health, economic well-being, subsistence lifestyles, and cultural traditions depend upon the natural environment, will likely be negatively affected by the degradation of ecosystem goods and services associated with climate change.

For this reason, combined with EPA's call for cooperative federalism with state and Tribal governments to address environmental problems collectively, the NTAA and its member Tribes encourage the state to establish consultation policies and procedures as the state reviews, evaluates, and comments on future EPA rulemaking related to GHG emissions regulations. Furthermore, the NTAA and its member Tribes also encourage the state to use these consultation policies to conduct outreach to the Tribes



as it develops its State Implementation Plan under any future EPA rule related to GHG emissions regulations.

The result of meaningful government-to-government consultation should be that substantive Tribal input has been considered and incorporated into any state policy and actions having Tribal implications. To be meaningful, consultation by the state with the Tribes should:

1. Provide clear guidance on how the relevant state agency intends to assure that government-to-government consultation with Tribes will result in meaningful dialogue rather than simply pro forma consultation.
2. Assign to the state action a Tribal liaison who has worked extensively with Tribes on similar issues.
3. Send a letter to Tribal chairpersons with copies provided to appropriate Tribal staff (e.g., Tribal administrator, Tribal historic preservation officer, environmental and/or natural resources manager) that asks Tribes how they would like to be consulted regarding the state action, and a request for the names and addresses of other persons who should be notified or consulted.
4. Provide assurances to Tribes that the most senior-level state agency official will be engaged in government-to-government consultation regarding the state action since Tribes will likely be represented by its highest-level officials such as Tribal chairpersons and/or council members.
5. Provide assurances to Tribes that communications and documents shared as part of government-to-government consultation shall remain confidential unless the parties involved agree to share any such communications or documents with outside parties.
6. Provide sufficient time or maximum administrative discretion to Tribes to review and provide comments regarding the state action.

Lastly, in addition to group outreach sessions, the state agency should engage in government-to-government consultation with individual Indian Tribes. Government-to-government consultation with individual Tribes is necessary and meaningful for a number of reasons. First, it provides for more candid conversations between the individual Tribe and the state agency than what would occur otherwise during a group meeting. Second, each Tribe's circumstances are unique and must be treated as such by the state agency. A group meeting of Tribes would only give short shrift to these circumstances. Third, most cultural resources information should be protected from public release. Discussion of such information by an individual Tribe as part of a group meeting of Tribes risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique that government-to-government consultation between individual Tribes and the state agency provides the best opportunity for a resolution to the situation versus a group meeting of Tribes where any number of Tribal issues could be brought up with only a limited period of time to discuss them.

Conclusion

In summary, the NTAA and its member Tribes strongly encourage the State of Virginia to engage the Tribes on its efforts related to the ACE Rule, as well as GHG emissions reductions and



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regulations. If you have any questions or require clarification from NTAA, please do not hesitate to contact me or NTAA's Project Director Andy Bessler at 928-523-0526 or andy.bessler@nau.edu.

Thank you for your time and prompt consideration of this request.

Sincerely,



Wilfred J. Nabahe
Executive Committee Chairman
National Tribal Air Association
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